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WE present to the legal profession and the public, the first number of the CENTRAL LAW JOURNAL. We have not undertaken this enterprise without due consideration of the nature of the task before us, nor without making extensive enquiry, by correspondence and otherwise, to ascertain the needs and expectations of the profession in regard to such a publication. We have chosen to make it a weekly in preference to a monthly or quarterly, not because this form promises more profit in proportion to the labor and money expended upon it, but because a paper published weekly, will afford, as we conceive, the highest degree of usefulness.

It concerns the bench and bar to know, at the earliest possible period, the rulings which are being made in courts of eminent character and of last resort. This information we shall endeavor, as far as practicable, to supply. Opinions which possess a general interest or peculiar local value, will be published in full, with carefully prepared head-notes, and such other annotations as may seem appropriate. Other decisions will be presented in the shape of editorial notes of greater or less length, according to the supposed importance of the questions adjudicated. This plan, while it involves more labor, seems to us preferable to the "digest" plan adopted by most of the legal publications. It gives us more freedom of expression, enables us to add where it seems necessary, our own notes and comments, and brings us more nearly into a sort of conversational connection with our readers.

Most of the matter used in these notes, coming from courts in the Mississippi Valley, will be furnished by our own special correspondents and reporters. For such as comes from courts at a greater distance, we shall be indebted, principally, to our legal and other exchanges.

In view of the growing importance of the Federal Courts, it will be a special feature of the JOURNAL to advise its readers at the earliest practicable date, of the important questions therein adjudicated. It will give, from week to week, a summary of the proceedings had in the Supreme Court of the United States during its sessions; and special pains will be taken to keep its readers fully advised of the important questions decided in that court. It will also contain early advice of the important matters transpiring in the English courts.

In a department of "Notes and Queries", we shall answer, as well as we can, any questions of general interest propounded to us by correspondents.

Some space will also be devoted to news items of interest to lawyers; embracing such matters as the death of eminent judges and lawyers; changes in the constitution of important courts; the doings of Congress, of constitutional conventions, and of the state legislatures, so far as they involve important legal matters; and any like items of news that may be supposed to be of interest to the profession.

We shall examamine, with what care our time will permit, and notice editorially, any important law book sent to us for that purpose. While we cannot hope to devote to any book more than a hasty examination, we shall endeavor in these notices to be candid and impartial; to avoid extravagant praise on the one hand, and unjust censure on the other. The department of "Book Notices" will not be kept open as an advertising medium; it will be under the exclusive control of the editors; the publishers will have nothing to do with it.

Judges and counsel, who furnish us with early copies of important decisions, will place us under special obligations to them. We shall be under like obligations to reporters who may favor us with advance sheets of their reports.

Correspondence on topics of current legal interest, is solicited. It will be scarcely necessary to advise correspondents to be brief. In a busy profession, like that of the law, few persons can afford the time or find the patience to peruse long articles; nor can a weekly journal, dealing with a great variety of topics, afford the space to print them.

Hoping to be able to improve upon each number of the JOURNAL, until it approximates somewhat to our conception of what such a legal serial should be, we commit this first number to the criticism of the legal profession, and, we trust, to their support.

The Bankrupt Act—Shall it be Repealed?

In a commercial, manufacturing and trading country, a bankrupt system so framed as to be adapted to the circumstances of the people, is beneficial alike to the debtor and the creditor. Such a system is particularly desirable in a country of vast extent. Divided, as the United States is, into forty states, each of which, in the absence of a bankrupt enactment, makes the laws which regulate the relation and rights of debtors and creditors within its limits—if credit is to be extended and commercial intercourse freely maintained between the people of the different states and sections, a bankrupt system, wisely conceived, becomes almost a necessity.

Without a bankrupt law, each state has its separate collection and attachment laws, under which the creditor who first moves, secures a preference over the rest; and the local or the favorite creditor fares well at the expense of all the others. A bankrupt law, also, affords the only means by which debtors who have failed in business, can be relieved from the load of hopeless insolvency.

We doubt whether the present bankrupt law is worse than the system which it superseded. Doubtless, it has many faults

and defects. Most of these, however, are not intrinsic, but remediable by well-considered legislation. Undoubtedly, that portion of the involuntary feature of the present law, which makes it an act of bankruptcy merely to suspend payment, or fail to meet one's commercial paper for fourteen days, is, under the existing state of the finances of the country, harsh and oppressive, and it ought to be immediately repealed, or essentially modified. There is no such feature in the English bankrupt laws. By the English acts, "the suspension of payment by a banker, merchant, or trader, of his commercial paper and liabilities, is resolved into an act of bankruptcy by summoning him before the court of bankruptcy, and if the debt or demand be not paid or arranged to the satisfaction of the creditor within a prescribed time, the non-arrangement or non-payment, within such prescribed period, constitutes an act of bankruptcy." (James, Bankrupt Law, 261; In re Clemens 2 Dillon C. C., 536.) This provision is much preferable to the similar one in our act, and even this might be too stringent at the present time.

In a gust of seeming popular feeling, the house of representatives recently passed a bill for the absolute repeal of the bankrupt act. The senate seems wisely to insist upon time for consideration. In a matter of so much consequence, it would appear to be the part of true wisdom, to repeal at once only those portions of the law which are not adapted to existing circumstances, and which work harshly, and then, following the course which is so often adopted in Great Britain in respect to important legislation, appoint a commission to investigate the defects and imperfections of the present act, and report such changes as experience has demonstrated to be necessary for the successful working of the system. Such a commission, composed, in part, of members of congress and of one or more of the federal judges, and an attorney of large experience in bankruptcy proceedings, would doubtless be able to suggest such amendments to the existing law, as to make its workings satisfactory to the country at large.

The Late Mr. Justice Nelson.

The death of this distinguished jurist, which occurred on the 13th of December last, at his home in Cooperstown, N. Y., makes it fitting to refer to his life and character, and to draw from them the lessons they are so well calculated to teach. We have long regarded him, in his personal and judicial character, as the highest type of an American judge. His whole life was given to his profession. Born in 1792, he was admitted to the bar in 1817, and continued in the practice until 1823, when he was appointed one of the circuit judges of the state. In 1821, however, he was a member of the constitutional convention of New York, and it is said that it was in this body that his great legal abilities first became generally known, and that this led to his selection and appointment to the bench two years afterwards. He went upon the circuit bench in 1823, and remained there until 1831, when he was transferred to the supreme bench of the state, in the place of Judge MARCY, elected to the senate, and he continued to be an associate justice of that court until 1837, when he was commissioned to be its chief justice, and he remained such until 1845, when he was appointed by President Tyler, an associate justice of the Supreme Court of the United States, and remained such until his voluntary retirement from the bench in November, 1872.

Lacking but a few months, therefore, he was a judge, without interruption, for fifty successive years. He was, in fact, judicially employed for more than fifty years; for, after his retirement, he investigated a most complicated cause, and prepared an elaborate and masterly opinion in it, which was completed only a short time before his death.

Judge NELSON's personal appearance was impressive. No one who ever saw his erect bearing, his massive frame, his large head, with its flowing white hair, the clean cut features of his handsome but strong face, could forget his striking presence.

But his character as a judge is that which endears his memory, and will perpetuate his fame. His integrity—that commonest, but indispensable quality in a judge—no man ever questioned. The simplicity of his nature was never corrupted, nor its strength enervated by the luxurious and extravagant tastes and habits which, unhappily, have become too prevalent in these latter days. To the end, he preferred the quiet of his rural home, beside the waters of the beautiful lake on which he lived, to a residence in the great metropolitan city, within his circuit, or in the feverish atmosphere of the capital.

His love of justice was intrinsic, predominant and supreme. He had been favored by nature, in an extraordinary degree, with what may be called the *judicial temperament.*

His patience was invincible; his equanimity of temper never deserted him; and he was incapable of becoming a partisan in the trial or hearing of a cause, or of receiving an undue bias, or of yielding to hasty and crude views.

We have good authority for the statement, that in the heat and ardor which sometimes attend the discussions of the conference room, one member was never known to lose his evenness of temper, and that was the illustrious deceased.

His judgment was almost unerring, and was noted for its breadth and soundness. His learning was varied and extensive, and he brought to the discharge of his duties in the federal courts, the great experience of his long service upon the *nisi prius* and appellate bench of the state.

The opinions of no judge in the country were more deferentially submitted to than his; and he seemed equally conversant with the peculiar and difficult questions of federal jurisprudence, which arise under the constitution and statutes of the United States, and with questions of commercial, international and admiralty law. His knowledge of the law relating to patents for inventions, and his skill and judgment in the decision of questions of novelty and infringement have, perhaps, never been surpassed.

An admirable judicial quality of Judge NELSON'S was his utter want of pride of individual opinion. He seemed to care nothing for views which he had expressed when upon the supreme bench of the state or upon the circuit. If satisfied, after more reflection and further argument, that he was mistaken, he would be the first to insist on setting the law right, and correcting his own errors. The judgment of the future will confirm the verdict of the present, that the deceased wa-

a great judge; not great in the sense of originating legal reforms, or in the field of original investigation, but great in the power to decide correctly, according to the principles which the courts and legislature have established for the settlement of judicial controversies. The judicial annals of America are bright with the names of MARSHALL, STORY, TANEY, KENT, GIBSON and SHAW. To these is now to be added the name of NELSON, the mild lustre of which will remain undimmed as long as the constitution endures, and the law is reverenced.

Power of Constitutional Conventions—New Constitution of Pennsylvania.

The extent of the power of a convention "to revise and amend the constitution" of a state, or rather the right of the legislature in the enactment authorizing the calling of such a convention to limit the powers of the convention, and to prescribe its mode of action, has been recently considered by the supreme court of Pennsylvania, in a case which has attracted great attention throughout the country.

On July 2, 1871, pursuant to provisions in the existing constitution, the legislature passed "an act to authorize a popular vote on the question of calling a convention to amend the constitution of Pennsylvania;" and the proposition having been carried, the legislature, on the 11th day of April, 1872, passed "an act for calling a convention to amend the constitution." Among other things, this act contained a provision (Sec. 6) "that the election to decide for or against the adoption of the new constitution, or specific amendments, shall be conducted as the *general elections of this commonwealt hare now by law conducted.*"

The convention, before adjourning, passed "an ordinance" regulating the time and manner of holding the election for voting on the proposed constitution, which ordinance was opposed in its provisions, to the general election laws of the state.

A bill was filed to enjoin the commissioners appointed by the ordinance from acting under the ordinance, and from appointing election officers, or making a registration of voters, or directing or controlling the election; and in the case of Wells v. Bain and Fitler et al (Phila. Legal Gazette, Vol. 5, p. 400, Dec. 12, 1873) the supreme court sustained the bill and awarded the injunction. The opinion of the court appears to have been unanimous, and was delivered by Chief Justice AGNEW, on the 5th day of December, 1873.

Grave doubts, however, attend the doctrine of the supreme court, that it is competent for the legislature in the absence of constitutional provision, or a vote of the people upon the point, to limit in this manner the mode of action of a constitutional convention, lawfully assembled. The view of the supreme court of Pennsylvania, however, is very strongly argued by the chief justice, and the substance of his argument appears in the syllabus of the case, which, as found in the Legal Gazette, *supra*, is as follows:

The constitutional convention of Pennsylvania, before adjourning, passed an "ordinance," regulating the time and manner of holding the election for voting upon the proposed new constitution prepared by them. The ordinance provided, *inter alia*, for the appointment of election commissioners for the city of Philadelphia, who were to conduct the election in that place, in accordance with the regulations laid down for their guidance in the ordinance. These regulations being contrary to the general election laws of the commonwealth, as applicable to Philadelphia, an injunction was sought or to restrain the commissioners, and the officers appointed by them, from conducting the election, and to restrain the city officials from furnishing blanks, etc., to the commissioners, or otherwise expending the city moneys for the expenses of said commissioners. The supreme court at *Nisi Prius* granted the injunction, holding as follows:

1. The constitutional convention was the offspring of *law*, which law was the only form in which the legislature, *the body invested with the powers of government*, could act, and thereby its (the legislature's), own consent be given and revolution avoided.

2. The law being the instrument of delegation, the act of assembly, or warrant to the delegates from the people (*i. e.*, the members of the convention) was the only chart of their powers.

3. The delegates possess no inherent power, and when convened by law at the time and place fixed in it, sit and act under it, as their *letter of attorney* from the people themselves.

4. The act of assembly of April 11th, 1872, which provided "for calling a convention to amend the constitution," gave the convention no power to frame the ordinance in question, which is, therefore, illegal and void.

5. The court has jurisdiction to restrain invasions of right, without authority under the exising laws, and therefore has jurisdiction of this case.

We may observe, that in the case of Woods v. Hare, 5 Phil. Legal Gazette, 397, the court of common pleas of Allegheny county, held the following propositions:

"1. The act of assembly of 1871, providing for a vote of the people apon the question of calling a constitutional convention, and the act of 1872, which provided for calling it, were both constitutional and valid.

2. There is underlying our whole system of government, a principle of acknowledged right, in the people, to change their constitutions, *except where specially prohibited in a constitution itself*, in all cases and at all times, whether there is a way provided in their constitution or not.

3. A convention to amend the constitution without the power passed upon by the people, in determining the question of amendments, has inherently, by the very nature of the case, under the great principle, quasi-revolutionary in its character, above mentioned, absolute power, so far as may be necessary, to carry out the purpose for which they were called into existence by the popular will.

4. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammeled by mere legislative limitations, to propose to the people for their consideration and adoption, any plan they may see fit."

But this last named court did not pass upon the question of the right of the convention to provide a mode of submission to the voters, differing from, and in substance, repealing the act of the legislature under which the convention was called together.

The general subject is exhaustively discussed by Judge JAMESON in his valuable work on Constitutional Conventions, and his views favor the judgment of the supreme court of Pennsylvania. But the doctrine that a convention lawfully assembled, to amend a constitution, can be trammeled and restricted ed as to the mode in which it shall submit its work to the people, by an ordinary act of legislation, is by no means clear to our mind, and seems to be open to grave objections, and might be used to perpetuate abuses, or deprive the people of powers and rights which justly belong to them.

Taxation of the Union Pacific Railroad by the States.

The Union Pacific Railroad Company is a corporation chartered by congress, and was aided by the general government by bonds and lands, and subjected to military and postal duties. The relation of this corporation to the public, and to the state of Nebraska traversed by it, is anomalous and peculiar, and has given rise to some interesting and important questions. The circuit court of the United States for the district of Nebraska, in 1871, held that the state had the power to tax the road-bed and rolling stock of the company, for the reasons which appear in the report of the case. Union

Pacific Railroad Company v. Lincoln county, 1 Dillon C. C. R., 314.

Its judgment in this case was affirmed by the Supreme Court of the United States a few days since, the case in that court being entitled "The Union Pacific Railroad Company v. Peniston, Treasurer of Lincoln county." The case in the Supreme Court was argued in behalf of the state by *Mr. Woolworth*, and for the company by *Mr. Evarts*. The main ground urged against the power of the state to tax was that the road was a federal instrumentality, and that the recognition of the right of the state to tax and sell the road, was inconsistent with the purpose of congress, in creating the corporation, and with the rights of the government in the road. The act of congress is silent as to taxing the road. A majority of the court decided against the *implied exemption* of the road from the power of the state to tax it. We have not seen the opinion of the court, which was delivered by Mr. Justice STRONG; but it proceeds, we understand, upon the ground that "the tax in question is too remote in its effects upon the efficient exercise of the federal power, to be for that reason inhibited by the constitution. To hold otherwise would be to deny to the states all power to tax persons or property; for every tax levied by a state withdraws from the reach of federal taxation, a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. Admitting fully that the company is an agent of the general government, both military and postal, no constitutional implications prohibit a state tax upon the property of an agent of the government, merely because it is the property of such an agent. United States mails, troops, and munitions of war, are carried upon almost every railroad. Telegraph lines are employed in the national service; so are steamboats, horses, stage coaches, wagons, foundries, ship yards, and multitudes of manufacturing establishments. These are the property of natural persons or corporations who are instruments or agents of the general government. Were they exempt, as here claimed, it is manifest that the state government would be paralyzed. The decree below is affirmed."

Mr. Justice BRADLEY, dissenting, says, that if the road-bed may be taxed, it may be seized and sold for non-payment of taxes, separated by county or state lines, and thus the whole purpose of congress, in creating the corporation and establishing the line, may be subverted. In his judgment the tax was unconstitutional. Mr. Justice FIELD concurred with Mr. Justice BRADLEY. Mr. Justice HUNT dissented from the opinion of the court, but wrote no opinion.

Mr. Justice SWAYNE wrote an opinion, concurring in the result reached by the majority of the court.

Railway Aid Bonds.

We publish elsewhere the elaborate opinion of NAPTON, J., in the case of Smith & Hall v. Clark county, as well as the two brief opinions delivered in overruling the petition for a re-hearing. The great importance of this case, not only to the state of Missouri, but to the profession, and to the holders of municipal bonds throughout the country, justifies us, notwithstanding its length, in publishing it in full, and in accompanying it with a note intended to show the views of the supreme court of Missouri, from the beginning to the present time, upon the nature of such securities, and the defences which may be made thereto, when in the hands of innocent holders for value. In many respects, the law applicable to city and county bonds issued under authority from the legislature, has, so far as respects the federal tribunals, been settled by the Supreme Court of the United States. But under the constitutional provision, and the legislation of Missouri, some cases have arisen novel in their facts, if not in the principles upon which they must be decided; and the decisions which have recently been made upon these securities by the federal courts in Missouri, we shall publish from time to time, as opportunity and space will permit, commencing next week.

As to the nature of the power to issue such securities, and the defences which may be made to them, there exist some differences of opinion between the Supreme Court of the United States and some of the state tribunals. This difference will be illustrated by the very recent decision of the supreme court of Kansas, in the case of Lewis v. Bourbon county, which will appear in our next number.

Constitutionality of Acts Passed Under a Former Constitution.

In Spencer v. Klinger, determined at St. Louis, November 24, 1873, the supreme court of Missouri put to rest a very important question in a few words. The action was ejectment. The plaintiff had, in 1864, conveyed the land to the defendant, and now brought suit to recover it, on the ground that she was a minor at the time the conveyance was made, and that the conveyance was hence void. The defendant was in her eighteenth year when the conveyance was made, but had previously procured a special act of the legislature, declaring her of lawful age, and legally competent to transact her own business. It was now insisted that the act was unconstitutional and void, and that the deed made in pursuance of it, therefore passed no title.

WAGNER, J., said: "Whatever might be our opinion in regard to the policy or even validity of such acts under different circumstances, we are constrained at the present day to hold them good. An examination of the session acts will show, that from an early period in our state's history, acts of this description were passed at almost every session, that their legality was never challenged, and that they were constantly acted upon.

It would be entirely safe to say that millions of dollars have been invested upon the strength of these titles, and for the court, at this day, to declare the acts and titles made in pursuance of them void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent.

"We must therefore decline to go into the question, or consider it open to discussion. The constitution of 1865, very wisely prohibits, in express terms, the special enactment of such laws; and the abuses which were practiced under the former constitution in this respect cannot again occur. But past titles which were made and received when the acts giving them validity were universally acquiesced in, cannot be disturbed. The court below decided for the defendant, and its judgment must be affirmed."

The other judges concurred.

JUDGE HALE of New York, now a member of the National House of Representatives, has been tendered by Governor Dix, the position of judge of the court of appeals in that state, and it is understood he will resign his seat and accept.

Validity of County Bonds Issued to Railroad Companies.

SMITH & HALL v. CLARK COUNTY.

Supreme Court of Missouri, Saint Louis, October Term, 1873.

WASH ADAMS,
DAVID WAGNER,
W. B. NAPTON,
H. M. VORHIES,
A. T. SHERWOOD. } Judges.

1. **Jurisdiction—Pecuniary Limit.**—Although the Circuit Court of Missouri is limited in its jurisdiction in actions upon contracts, to amounts not less than one hundred dollars, yet it may entertain an action upon a number of coupons for thirty-five dollars each, detached from the same series of bonds, if such coupons amount in the aggregate to one hundred dollars or more. [The same principle in the Federal Court. Judson v. Macon County, 2 Dillon, C. C. 213.]

2. **Coupons—Negotiability.**—Coupons, although not payable to any particular person, are, nevertheless, negotiable. [Acc. McCoy v. Washington County, 3 Wall., Jr. 381.]

3. **Construction of Railroad Charter—Privilege.**—The charter of the Alexandria and Bloomfield Railroad Company, provided that the company should be entitled to all the privileges, rights and immunities which had been previously granted to the North Missouri Railroad Company. The charter of the latter company provided that the county courts of any county through which any part of the road passed, might subscribe to the capital stock of said company. *Held*, that the effect of this provision in the charter of the Alexandria and Bloomfield Railroad Company, was to re-enact, as to that company, the provision above stated of the charter of the North Missouri Railroad Company, so as to authorize the county court of a county in which the former road was situated, to subscribe to its stock. The power thus conferred on the county courts to subscribe to the capital stock of a railroad company, may well be termed a "privilege" granted to the company.

4. **Repeal of Special Provision in Charter by General Law.**—A provision in the charter of a railroad company, authorizing the county courts of the counties through which the road passes to subscribe to its capital stock, without requiring a vote of the people of the county, is not repealed by a general law subsequently passed, prohibiting such subscriptions without an affirmative vote of the people of the county, when such subscription is proposed. [Acc. State *ex rel.* Mo. and Miss. R. R. Co. v. Macon County Court, 41 Mo., 453.]

5. **Recitals in Bonds—Estoppel.**—If the power existed in a county court to issue certain bonds, a false recital of such power on the bonds themselves, will not vitiate them in the hands of an innocent holder; although it might create an estoppel against the county or its agent. Thus, where certain county bonds purported to be issued under the general law of 1855, the holder was not estopped from showing that they were, in fact, issued under a special act chartering a railroad company, passed in 1857. [Per NAPTON, J., *arguendo*. See opinion on motion for rehearing.]

6. **Agent of Municipal Corporation—Derivation of Power.**—The doctrine recognized, that the agent of a municipal corporation, derives his power to subscribe for stock in a railroad company, or to issue bonds of the corporation, not from the people of the municipality, but from the legislature. The law gives the power, but restricts its exercise, by requiring a vote of the people. [Per NAPTON, J., *arguendo*. See opinion on motion for re-hearing.]

7. **The Same—Ultra Vires.**—If there has actually been a grant of power to an agent to execute a negotiable instrument, the instrument is valid in the hands of an innocent holder, and the principal is bound, although the agent may have exceeded his instructions in executing the power, or may have executed it in a different manner from that prescribed. [Per NAPTON, J., *arguendo*. See opinion on motion for rehearing.]

8. **The Rule Applied to Municipal Bonds.**—In accordance with this principle, a *bona fide* holder for value of a bond of a municipal corporation issued under an act of the legislature of a State, has a right to presume that all precedent requirements of the act conferring the power have been complied with If, therefore, the act under which such a bond purports, on its face, to have been issued, or its amendments, required an election by the people of the municipality, and an affirmative vote, before such bond should be issued, it is no defence to a suit on such bond by a *bona fide* holder for value, that no such election was, in fact, held. [Per NAPTON, J., *arguendo*. See opinion on motion for re-hearing.]

ON MOTION FOR RE-HEARING:

9. **Provision in Railroad Charter—Vested Rights.**—The court does not mean to intimate that the provision of a railroad charter, allowing the county courts of counties through which the road passes, to subscribe to its capital stock, and issue the bonds of the county in payment of the same, is a franchise which it was not competent for the legislature to repeal, either before or since the adoption of the new constitution.

10. **Action of County Court—Estoppel.**—A majority of the court hold that the recitals in the bonds issued by the county court to the railroad company in this case, are not conclusive, and do not amount to an estoppel against the county, notwithstanding the settled doctrine of the Supreme Court of the United States to the contrary; and that it was not necessary to the determination of this case, so to hold.

11. **Opinions of Supreme Court—Arguments—Illustrations.**—In delivering opinions, the judge who delivers them is allowed to make his own arguments and illustrations, without compromitting the other judges; and in concurring in the result, the other judges do not necessarily sanction the illustrations used by the judge who delivers the opinion.

12. **Bonds Issued to Defunct Corporation—Collateral Proceeding.**—It is no objection to the validity of bonds issued by a county court to a railroad company, that the charter of the company had expired before the company was organized, if the corporation existed as a matter of fact, and was in the exercise of its chartered franchises, at the time the subscription was made and the bonds issued. In such a case, whether or not the corporation had a legal existence before the subscription was made, cannot be tested in this collateral way. Such a question can only be raised in a direct proceeding by *quo warranto*, on the part of the State.

Barrow & Higbee, *Dryden & Dryden*, and *R. E. P. Anderson*, for plaintiff in error; *Spangler*, *Givens & Day*, for defendants in error.

NAPTON, J., delivered the opinion of the court:

This suit was brought in August, 1867, on seven coupons, detached from bonds, dated January 1, 1865, due in twenty years and payable to the Alexandria and Bloomfield Railroad Company or bearer. The bonds are in these words:

"$500. United States of America. No. 51. Alexandria and Bloomfield Railroad Company, county of Clark, state of Missouri, bond due in twenty years from date. Know all men by these presents, that there is due from the county of Clark to the Alexandria and Bloomfield Railroad Company or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first day of each year, at the treasury of the said county of Clark, on the presentation and surrender of the annexed coupons; the principal to be due and payable twenty years after date hereof; for the performance of all of which, the faith of said county of Clark is irrevocably pledged, as also the property, revenue and resources of said county of Clark. This bond being issued and pursuant to orders of the county court of Clark county, as authorized by an act of legislature of the state of Missouri, entitled, "An act to authorize the formation of railroad associations and regulate the same," approved Dec. 13, 1855. In testimony whereof, the said county of Clark has executed this bond by the presiding justice of the county court of Clark county, under the order of said court, signing his name hereto, and by the clerk of said county, under the order thereof, attesting the same and affixing the seal of said court. This done in the town of Waterloo, county of Clark aforesaid, this, the first day of Jannary, 1865. HARVEY SEYMOUR,
Attest: Presiding justice of county court of Clark county.
G. M. OCHILTREE, clerk of the county court of Clark county."

Coupons are as follows:

"State of Missouri. Bond No. 51. $35. The county of Clark will pay thirty-five dollars on this coupon on the first day of January, 1867, at the treasury of said county. G. M. OCHILTREE,
Clerk of the Clark county court."

The petition states that the coupons due in 1866 were paid, but that the coupons sued on, due in January, 1867, were not paid, although duly presented. There were separate counts on the seven coupons sued on.

The answer denies that said bonds were issued in conformity to the law of Dec. 13, 1855; asserts that no vote of the qualified voters of the county authorized the issue of the bonds for $50,000.

After a trial and a multiplicity of pleadings and a change of venue, the case was finally determined in the circuit court upon an agreed state of facts, which were substantially these:

1. That the A. & B. R.R. Co. was incorporated by the act of February 9, 1857, and subsequently, to-wit, on the 17th of September, 1864, duly and legally organized.

2. It is admitted that sections 8, 9, 10, 11, 14 and 19 of the act incorporating the N. M. R. R. Co. (approved March 13, 1851,) were on the 17th of September, 1864, specially adopted by said A. & B. R. R. Co.

3. That after the organization of said company, to-wit: on the —— day of —— 1864, the following entry was made on the books of said company:

"We, the undersigned judges of to subscribe

$200,000 to the A. & B. R. R. Co., payable in county bonds, due in twenty years, at seven per cent. per annun, for said county of Clark, state of Missouri.

"Harvey Seymour, B. P. Hannan, Jacob Tinsman. Number of shares, 20,000; amount, $200,000."

That said H. Seymour and B. P. Hannan, signed the same at Luray in said county, and Tinsman at his residence during the vacation of the county court.

4. That afterwards, to-wit: on the ——— day of ——— by an order of said county court, duly entered of record, the question as to whether said county should subscribe 200,000 dollars to the capital stock of the A. & B. R. R. Co., was submitted to the resident qualified voters of said county, to be voted upon at the general election for state and county officers, held on the first Tuesday of November, 1864, at which said election a majority of the resident voters of said county voted not to subscribe said sum; that afterwards, to-wit: on the 6th day of June, 1865, the said county court, by its order duly entered of record, having ordered the same, a special election was held for the purpose of voting upon the question submitted to the resident voters of said county, as to whether said county would subscribe 100,000 dollars to the capital stock of said company, at which election a majority of the resident voters of said county voted not to subscribe said sum.

5. That afterwards, to-wit: on the 10th day of June, 1865, and at the dates subsequently, as the same appear in the transcript from the records of said county court hereto attached, marked "A" and made a part hereof, the said county court made the order, as in said transcript set forth, that on the said 10th day of June, and in pursuance of said order of that date, the county court issued and delivered to the A. &. B. R. R. Co. one hundred $500 negotiable bonds, with twenty interest coupons thereto attached to each of said bonds, of which exhibit "B" herewith filed, is admitted to be a copy, each coupon for the sum of $35, said bonds payable to said company or bearer, of which the bonds and coupons described in plaintiffs' petition and the coupons sued on, were a part; that said bonds were dated January 1, 1865; that afterwards, J. H. Crane, the duly authorized agent of said railroad company, before the maturity of said bonds and coupons sued on, for a valuable consideration, sold, transferred and delivered the said bonds and coupons to plaintiffs, who were then partners doing business under the firm name and style of Smith & Hall, who received said bonds and coupons in good faith, without actual notice of any defects in their issue, and that upon the representations of said Crane, that said bonds and coupons were issued to said company in payment of subscription of said county of Clark to the capital stock of said company; that the bonds and coupons now belong to plaintiffs, and are due and upaid.

6. It is admitted that, in pursuance of the order of the county court, authorizing him so to do, as the same appears in the exhibit hereto attached, marked "A," G. M. Ochiltree was present at an election held by said railroad company for the election of officers, on the first Monday of May, 1866, and as the agent of said county cast the vote of said county, in which he represented and cast 500 votes for and on behalf of said county, which said votes represented $50,000 stock of said company.

7. It is admitted that the first annual and a large proportion of the second annual instalment of coupons on the bonds described in plaintiffs' petition, were paid by the said county, on the presentation of said coupons at the county treasury; that the coupons sued on were presented to the county treasury on the 29th March, 1867, and payment demanded, and payment was refused, as will be shown by reference to endorsements on the back of said coupons. The coupons sued upon were made part of this statement.

Signed by Hagerman, attorney for plaintiffs, and Lipscomb & Anderson for defendants.

The order of the county court, referred to in the foregoing agreement, is as follows: "Whereas, heretofore, on the —— day of ——, 1864, the county court of Clark county, entered into a certain obligation to and with the A. & B. R. R. Co., by signing the books of said company, and subscribing $200,000 to said company's stock, by which obligation the county became liable to a prosecution for the said sum of $200,000; therefore, it is ordered by the court, that the county of Clark issue the sum of $50,000 in seven per cent. bonds, payable twenty years from date, interest payable annually, which is to be received by said A. & B. R. R. Co., in full satisfaction for the adjustment of said former liability, and that said bonds be placed in the hands of the county treasurer, to be by him paid out to said A. & B. R. R. Co., as other subscriptions are by the rules of said court required to be paid."

Section 14 of the North Missouri railroad charter, which is incorporated in that of the A. & B. R. R. Co., as authorized by section 10 of its charter, reads as follows:

"14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, &c."

Section 10 o the A. & B. R. R. charter (Feb. 9, 1857), is as follows:

"Said company shall in all things be subject to the same restrictions, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad company, by an act entitled 'an act to incorporate the North Missouri Railroad company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein enacted."

Various declarations of law were asked, but the plaintiff had a judgment on the facts agreed.

I. A question is raised here whether the court had jurisdiction, on the ground that each count declared on a coupon for $35, which is a sum below the jurisdiction of the circuit court, but the aggregate of the coupons sued on, is admitted to be within that Jurisdiction. In the United States courts where the amount of $500 is essential to confer jurisdiction, the aggregate of the coupons sued on, has been always, impliedly or expressly assumed as determining the question of jurisdiction. The point was expressly decided by Judge DILLON at the spring term of the circuit Court in Jefferson City. We know of no decisions in our courts to the contrary.

II. Another point made in the case, is that the coupons in the case, not being made payable to any particular person, are not negotiable. That point is decided in McCoy v. Washington county, 3 Wallace, Jr., 381.

III. It is apparent from the agreed statement in the case, that the main and important question in it is, whether the court had the authority to issue the bonds in question under the act of 1857, which was the charter of the company, or whether the recitals in the bonds that they were issued under the General Statutes of 1855 were obligatory, and therefore, that the failure to call an election the recited act requires, vitiates the bonds.

The ground on which the circuit court decided the case, was that the charter of the company authorized a subscription without a vote; and we will examine that point first.

The charter of the A. & B. R. R. Co. was passed in 1857. It was enacted that the company should be entitled to all the privileges, rights and immunities which were granted to the N. M. R. R. Co., as fully and completely as if the same were re-enacted in the charter.

The charter of the N. M. R. R. Co. contained a provision that the county courts of any county in which any part of the road passed, might subscribe stock.

It is objected that the right of subscription granted to the counties on the line of the N. M. R. R., is not a privilege or immunity of the railroad company, but of the counties, and is therefore not transferred to the A. & B. R. R. Co. The section (14) conferring the power, as it appears from the agreed statement of facts, was

expressly adopted by the A. & B. R. R. Co. It was undoubtedly the intention of the legislature to give to the last named company the same privileges that had been granted to the former. The county court had no power to subscribe to the stock of the railroad corporations, without a special authority from the legislature, either express or implied. The power thus conceded to the courts or other municipal bodies, may well be termed a privilege to the corporations, and we see no substantial objection to a transfer of such a privilege, by simply, in general terms, embodying the section of the original act which granted it, into the new law. That such was the intention of the legislature and of the railroad, company, is clear; and if the word "privilege" admits of the narrow construction claimed, the practical construction it has received in this State, as may be seen by reference to the decisions of our courts, would preclude any enquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charter would have been of no value. Hannibal & St. Joe Railroad Co. v. Marion county, 36 Mo., 295.

IV. The important question however remains: Whether this charter granted to the A & B. R. R. Co., on February 9, 1857, or rather, whether the section of it referred to, allowing subscriptions from county courts of counties along the line of the road, without a previous vote of the people, is not repealed by the subsequent acts of the legislature passed in 1860 and 1861, and before the subscription made in this case.

The law in the Revised Code of 1855, concerning railroad corporations does not require any election. The thirtieth section reads: "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized, under this or any other act in this State, and the county court or city council subscribing or proposing to subscribe to such capital stock, *may for information* cause an election to be held to ascertain the sense of the tax-payers of such county or city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

The act of January 14, 1860, amendatory of this law, merely changes the words, "may for information," into "shall for information."

That of March 3, 1861—which was also an act amendatory to the general statute in the Revised Code of 1855—requires an election to be held, and positively prohibits a subscription, if the result of such an election shows a majority of the votes of the county against it.

It is not of any importance, therefore, to enquire, whether the act of 1855 would not, of itself, be regarded as an expression of the intention of the legislature to prohibit the county and city authorities from subscribing to railroad corporations, without ascertaining the wishes of at least a majority of the people within their respective municipalities, because the amendatory act of 1861, undoubtedly so declares; and this act, as well as that of 1860, was passed before the subscription now in question was made.

At the same time, the charter of the A. & B. R. R. Co.—and we may add, without going outside of the history of various and repeated State adjudications and State legislation, the charters of a number of other railroad companies—allowed the counties, cities and towns, to subscribe without any vote of the people. The question is, whether the provisions in the general law, on the subject of railroad corporations, repealed the specific provisions of the special acts, chartering particular companies.

In 1867, the Macon county case was decided (41 Mo., 450) and the subject was there discussed and decided. It is true that the act of 1861, though referred to by counsel, is not particularly noted in the opinion of the court, but the act of 1865, which passed before the subscription made in that case, is fully considered, as well as the prohibitory clause of the constitution of 1865. The act of 1865 is just as stringent as the act of 1861, so far as the necessity of the vote is concerned, and it was more so in regard to the number of votes essential to authorize the subscription. The subscription in that case was made in 1867, after the adoption of the new constitution, and after the passage of the act of the legislature carrying into effect the constitutional provision.

In this case, (the Macon county case), the case of Alexander v. Saint Louis, 23 Mo., 483, is particularly examined, and the opinion of the court in this last named case is reaffirmed, and the doctrine applied to the case under consideration. It was held that a general prohibition is not inconsistent with a special indulgence, and that a special indulgence is not repealed by a general prohibition, though the latter is subsequent in time to the former. In the case of Alexander v. St. Louis, the city was, by its charter, expressly prohibited from subscribing to the stock of *any* corporation, and a special act passed before the passage of the charter allowing it to take a certain amount of stock in the Ohio and Mississippi Railroad Company, was held to be valid, and not affected by the general provision of the charter. In the Macon county case, the same doctrine is adopted; and the same subject—though not in regard to railroad corporations—is discussed in Deters v. Renick, 37 Mo., 597; in Vastine v. Probate Court, 38 Mo., 529; and in the City of St. Louis v. Md. Ins. Co., 47 Mo., 149; and a similar conclusion reached.

Moreover, the Macon county case was followed by the Nodaway county case, decided in 1871, [47 Mo., 346; S. C., 48 Mo., 339,] and the Sullivan county case, decided by this court at the February term, 1873, [51 Mo., 522], re-affirming the former decisions.

So that the provisions of the Rev. Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition and the legislative adoption of that prohibition, immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as the reports show, not to affect the repeal of the privilege contained in special charters.

That this was understood to be the law of the state, appears also to have been recognized by the legislative department of the government; for in 1872 the legislature passed "an act to repeal certain sections of the law, granting to county courts and other corporate bodies the power to subscribe stock to railroad corporations." This act was approved January 30, 1872, and specifically repeals certain designated sections in certain acts particularly specified and including among the twenty or thirty charters enumerated, the charter of the A. & B. R. R. Co. This was, or would have been, a mere act of supererogation if it had been understood or supposed, that previous legislation on this subject had already effected this object.

Thus it will be seen that, up to January, 1872, the decisions of the Supreme Court had been acquiesced in, and no doubt acted on, by the railroad corporations and the municipal authorities, of various counties, cities and towns; as the judicial history of the state undoubtedly shows. The necessary result was the investment of vast amounts of money in securities issued by counties, cities and towns, by virtue of the provisions in the charters of railroad corporations. After the acts of 1855, 1860, 1861, 1865, the subject was regarded as *res adjudicata*, and upon this view, millions of dollars have been invested.

Whatever, therefore, might be the opinion of this court, or of any individual judge, had the question come up for examination, as an open one, we are all of opinion that it is now too late to disturb the received construction.

V. But it is objected in this case, that the bonds, upon their face, purported to have been issued under the act of 1855, and that the holder is estopped from claiming that they were issued under the special act of 1857, which was the charter of the company.

Whether the recital in the bonds, would constitute an estoppel

against the makers, it is not important to enquire; if it were so, it would not follow that the purchaser or holder is bound. If he can show that the power existed, a false recital of it, however obligatory upon the county or its agent, would not defeat its efficacy, in the hands of a party in nowise concerned in the perpetration of the falsehood. Crane v. Lessee of Astor, 6 Peters, 598.

Conceding, however, that the law is otherwise in regard to this recital, the question would still remain, whether a recovery on such bonds could be defeated by proof on the part of the county, that no election was held. This question was presented by instructions in the circuit court, and decided; and, although it might be passed by in the case, yet as it is an important question, and arises in other cases, now before the court, it may as well be considered here.

In the examination of this question, it is proper to enquire what determination, if any, has been reached by the Supreme Court of the United States, on this point. The decisions of that court are not obligatory on this court, in questions of that character; but it is certainly very desirable, and of great importance to such of our own citizens as may have invested in such securities, that they should not be depreciated below their value in the hands of citizens of other states, or foreigners. The federal courts, having long since determined that these securities occupy the footing of commercial paper, do not consider themselves bound by the decisions of the courts of the state where they are issued, and have, in fact, utterly disregarded them in various instances, as the numerous cases in the Supreme Court from Iowa, and some from Michigan, show. The only effect, therefore, of contradictory decisions here, if such should occur, would be to compel our citizens, who hold such bonds, to sell them, perhaps at a ruinous discount, to citizens of other states, who can sue in the federal courts.

I do not propose reviewing the numerous cases in the Supreme Court of the United States, on this subject. They run over a considerable period, commencing, perhaps, with the case of Knox county v. Aspinwall, 21 How., 539, and terminating, so far as the published decisions go, in the case of Grand Chute v. Winegar, 15 Wallace, 355. There may be more recent cases, but I have not access to them.

In this case of Grand Chute v. Winegar, the question came up in a shape which renders the view of that court on it clear and unmistakable. The point is presented by a plea and demurrer, and is, therefore, not liable to be misunderstood, or to admit of conflicting constructions, as the general issues or abstract propositions stated in other cases, seem to have been considered. The seventh plea was, "that no special election, such as the act prescribed, had been called or held, previous to the issue of the bonds." The act, under which the bonds were issued, § 6, declared, "no bonds shall be issued by any town, in pursuance of this act, unless a majority of the votes, cast in said town, at the election hereinafter mentioned, shall be in favor of the same." Section 7, says, "a special election should be called and held in each of the towns before named, for the purpose of carrying this act into effect, within six months after the passage of this act," and then proceeds to specify particularly the mode of conducting the election. To this seventh plea, there was a demurrer, and the demurrer was sustained by the circuit court before which the case was tried, and on appeal to the Supreme Court, the judgment was affirmed.

Mr. Justice HUNT, who delivered the opinion of the court, refers to Knox County v. Aspinwall, 21 Howard, 539, Mercer County v. Hackett, 1 Wallace, 83, and Meyer v. the City of Muscatine, 1 Wallace, 384, and quoting the language of Judge NELSON in the first named case, says that a *bona fide* holder for value of a bond issued under an act of the legislature, has a right to presume that all precedent requirements of the act conferring the power, have been complied with. He says emphatically that "the cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents."

Now, in this case, "the form of law" not complied with, was the total absence of any election at all, which the law required; and this fact was specially pleaded, and to this plea there was a demurrer, which, of course, admitted the fact. There is, therefore, no room for misconception, as there was in some of the other cases which decided the same thing in general terms. The plea was held bad, and the want of an election held to be no defence.

The court, however, go further—I may say the court, for no dissent of any of the judges appears in the report—and quote with approbation the head-note of the reporter in the Aspinwall case, and apply it to the case then under consideration. In the Aspinwall case there had been an election, but upon an insufficient notice; but the court in the Winegar case, where there was no election at all, apply the principle or doctrine as announced by Judge NELSON, and put at the head of the case by the reporter, "that where the bonds on their face import a compliance with the law under which they issued, the purchaser is not bound to look further for evidence of a compliance with the conditions of the grant of power."

Notwithstanding some fluctuations of opinion as to the extent to which the doctrine in the Aspinwall case went, we may assert with confidence, that, with the exception of the case of Marsh v. Fulton County, all the cases since have conformed to the spirit and meaning of the Aspinwall decision. There were at first some dissenting judges who sought to establish different views, but recently it seems to be conceded, that the court has fully and finally settled on the doctrine of this leading case, and sustained the validity of municipal bonds in the hands of *bona fide* holders, wherever an authority to issue them is conferred by law although that authority may have been accompanied with conditions and limitations, which were disregarded by the municipal authorities. At times, this presumption of a compliance with the law on the part of the agents designated by the legislature, seems to have been based on estoppels, such as recitals on the face of the bonds, the fact that the county or city had levied taxes to pay interest on them, or had received in exchange for the bonds certificates of stock from the railroad companies. This last was the only estoppel in the case of Pendleton County v. Amy, 13 Wallace, 297. But the court ultimately take the broad rule heretofore stated, and which is announced in the City of Lexington v. Bullen 13 Wallace, 296, "that when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and are no more liable to be impeached in the hands of such a holder than any other commercial paper."

This being the result of the adjudications of the Supreme court of the United States, let us see how the question stood here at the time the bonds in question were issued and purchased.

In 1863, the case of Flagg v. the City of Palmyra was decided. In that case, the return of the city officers set up, as a defence, among other matters, that there was no election, though required by the act of the legislature authorizing the subscription. Issue was taken on this plea, but the evidence on the trial is not reported or noticed in the opinion of the court, for the manifest reason, as it will appear from the opinion, that the court regarded the issue as immaterial. For the court say: "In this case, if the bonds have been issued by the city of Palmyra, in apparent compliance with the law, and themselves gave no evidence of a want of performance of the prerequisites to their issuance, and no actual notice of any such defect is traced to the bondholder, we will not hold the bondholder to be affected by a failure of the officers of the city of Palmyra to perform all that was required by law of them, in anticipation of and preparation for the issuing of these bonds. Being issued in apparent conformity to the law,

the public (any of whom might acquire the bonds) is entitled to view them as issued in actual conformity to the law, and to suppose that all the acts required of the people and officers of the city of Palmyra had been duly performed.

"To apply these principles to the present case, we hold the bondholder to a knowledge of all that is combined in the act of the general assembly, to incorporate the city of Palmyra and the assembly acts above quoted; but in the absence of actual notice, do not hold them bound to enquire whether an election had been held as to the making of a registration of stock in the Q. & P. R. R. Co., or as the regularity of such an election of the qualified voters thereat, or whether the city of Palmyra had actually registered its stock in the Q. & P. R. R. Co., or whether such registration was made by the proper officer or officers of the city of Palmyra, The issuing of the bonds authorized the receiver or purchaser thereof to suppose that all those things, if required by law, had been done in the true form and substance required by law."

This language is plain, pointed and unambiguous, and substantially enumerates the doctrine of the Supreme Court of the United States, in the cases to which we have referred.

This was the law of this State in 1863, and continued to be the law, until the case of Steins v. Franklin County, 48 Mo. R., was decided, which was in 1871, eight years after the decision in Flagg v. Palmyra. The bonds in controversy in the case now under consideration, were issued in 1865, so that the law as declared by this court in the case of Flagg v. Palmyra, is the law which ought to govern the rights of the parties. Gelpcke v. City of Dubuque, 1 Wallace, 175; Thompson v. Lee County, 3 Wallace, 330; Havemeyer v, Iowa County, 3 Wallace, 303.

I have been unable to see the force of the distinction which this court has recently made, between the various prerequisites imposed by law upon the action of municipal bodies, and the grounds upon which a prominence is given to a mere election, without regard to the substantial defects which may accompany it.

It would seem that an election without notice, or upon insufficient notice, or one in which the requisite majority is not obtained, or at which disqualified votes are allowed, would be as worthless as no election at all. Of course, mere formal defects occupy a different position and may well be passed over, but it is conceded in all the cases, that every question as to regularity of the election and the result, is closed against the municipal body that issues the bonds, and it is only essential to their validity in the hands of *bona fide* holders, that some sort of an election should be held. It may be, that there is only a majority vote for the subscription, when the law requires two-thirds; it may be, that from want of sufficient notice, a mere fraction of the voters appear at the polls; it may be that hundreds of minors and other disqualified persons have voted; and in all these cases, the prerequisite of an election is as completely and essentially evaded, as if no election had been held. Yet the officers of the municipality are allowed to decide upon the question, and their decision is held conclusive. Why not hold it equally conclusive when no election at all is pretended? It is said that the power to subscribe is derived from the people of the county or city, and if this be conceded, a fraudulent or unfair and illegal election is as fatal to the exercise of the power, as a subscription without any election at all.

VI. But the power is derived from the law, without which the unanimous vote of every voter in the county or city could not confer it. The law gives the power, but restricts its exercise by requiring an election. The power is not derived from the people of the city, or the county, or township, but from the legislative branch of the government. The municipal subdivisions are allowed to issue negotiable securities upon certain conditions, and one of the conditions is not complied with. All the conditions and restrictions and limitations are equally binding. The absence of one of the prerequisites is as fatal as another. The securities are negotiable, and go to the market as negotiable paper. Is the buyer bound to enquire whether the prerequisites have been complied with? Or is he authorized to assume that these municipalities have done their duty, as the bonds on their face certify?

VII. As I understand the doctrine of agency, a negotiable instrument can not be defeated by a plea that the agent who executed it exceeded his powers; provided he was authorized to execute such an instrument upon conditions such as he failed to observe.

If a clerk or cashier issues paper, as an agent, to an amount exceeding that allowed by his principal, the holder can recover from the principal. Farmer's Bank v. Butchers Bank, 16 N. Y. 125.

If a security on a negotiable instrument makes the principal his agent, and instructs him to deliver it only in case some other person signs it, and the agent delivers it without such additional signature, all the cases hold that the security can not defend on the ground of want of authority. This is decided in a case at the present term.

VIII. The result of the decisions of the United States Supreme Court and of this court, at the time of the issuance of the bonds in controversy, is, that the holder had a right to presume that the act of 1855 and the amendments thereto had been complied with, and therefore, the defence of no election is unavailing.

It will, of course, be understood, that throughout this opinion, all the questions examined are in regard to the rights of *bona fide* holders of municipal bonds, and are not intended to indicate any opinion upon questions arising on mandamus or injunction, or other form of proceeding to arrest the action of municipal bodies or their officers. We have not referred to the decisions of this court on such questions, because very different conditions enter into such adjudications. Moreover, the law inflicts heavy penalties upon municipal officers who exceed or disregard their powers in subscribing to railroad companies, not only pecuniary, but personal.

In conclusion, I venture to copy and adopt the opinion of Judge GRIER, in Wood v. Allegheny County, 3 Wall, Jr. 267, whose opinion, however, bluntly, and, perhaps, quaintly expressed, seems to me quite as applicable to the condition of affairs in Missouri, as he supposes it to be in Pennsylvania:

"If the right of a municipal corporation to subscribe, even when authorized by the legislature, to purposes so alien to its general purposes, in the construction of works of improvement, and which, in the largest part, are in distant counties and other states, were open to me for consideration as a new point, I cannot say that I would hold such subscription other than simply void. The strongest arguments at law have been made against such subscriptions, and they are worth recurring to, as containing true and lawyer-like views of the extent and character of municipal powers. But the matter is not open in this court. The legislature of Pennsylvania has authorized counties to make such subscriptions, and the supreme court of the state has decided, though by a bare majority, that the act is constitutional.

"In spite, then, of all resistance by the county to paying these bonds, here are the bonds, upon which the county promises to pay. The county said to the railroad companies: 'We want to help you; we have not the money, but we will lend you our credit, our promise to pay.' That promise is, or ought to be, sacred. Doubtless many improper things have been done. The whole business of making cities and counties to subscribe to railroads, was unwise. This will be admitted now; though the counsels of the able and conservative men who took ground against it, were not heeded when given. Mercantile and popular clamor demanded 'subscription;' traders, politicians and all kinds of interested jobbers, urged and drove the matter, while commissioners, grand jurors and legislators have been led in the train. It is to be lamented that such things should be done, but they have been done. If the electors of our cities choose to hand over the

great concerns of our public offices to ignorant and unprincipled administrators, they must suffer by it. They must, themselves, bear the burdens which they put it in the power of knaves to pile upon them. Whatsoever a man soweth, that he shall reap, and when he sows the wind, he is apt to reap the whirl-wind.

"The objections urged against the plaintiff's claim would have force, if the questions were between the county and the railway companies. But it is not. It is between an innocent holder for value of a bond payable to bearer, and the party who sent it out into the market, or handed it over to others to do so, where it has been sold in the course of trade. It is useless to bring forward here, as against the business operations of this day, abstract dogmas out of Blackstone or the Institutes of Coke. Such instruments as these were never dreamed of in their day. The laws of trade suggest and govern these matters. As I said in the beginning, there is the bond; here is the fact. Your promise to pay is put upon the market. You gave it this negotiable and coupon form, for the purpose of facilitating sale and preventing all questions of equity about it, and now, when the promise has been put upon the market and sold to an innocent holder, you set up these equities. That would do. Why did you issue your bonds if you meant that the holder should look to the railways? Why did you not leave the railways to issue their own? For this reason only, that you knew that capitalists would trust you and would not trust them. I esteem the bold, hardy and industrious people of this country; I feel for them, with this load of debt put upon them by the careless and unworthy persons whom they have elected to office. But they have allowed the bonds to be issued and sold, and they must pay for them."

The judgment of the circuit court is affirmed, with the concurrence of all the judges except Judge SHERWOOD, who is absent.

AFFIRMED.

On a subsequent day of the term, a motion for rehearing was made; upon which ADAMS, J., delivered the opinion of the court, as follows:

This motion was not filed within the time prescribed by the rule of this court, requiring such motions to be filed within ten days after the opinion of the court shall have been delivered. But, as it is a very important case, and as there seems to be some misunderstanding in regard to the precise points passed upon by the court, we have considered the motion and in overruling it, I deem it proper to state briefly what was concurred in by us.

We assented to the proposition that the charter of the railroad company, which was enacted in February, 1857, allowed counties to subscribe to the stock of the company without taking a vote of the people. In regard to this matter, the charter is plain and positive. The next point was, whether this provision of the charter had been repealed by any subsequent legislation, or by the new constitution of 1865. This point was considered settled by repeated decisions of this court, to the effect that no subsequent act of the legislature or the constitution had repealed that provision of the charter.

On the faith of these decisions, large amounts had been invested, and we considered that the question had been put at rest, and had become a rule of property, which we had no right to disturb. This decision only applies to such charters as were granted prior to the constitution of 1865. There is nothing in the opinion which will warrant the conclusion that has considered that part of the charter, allowing such subscriptions a franchise which could not be repealed, either before or after the adoption of the new constitution.

It was not necessary to decide that the recitals, in the bonds issued by the county court to the railroad company, were conclusive or amounted to an estoppel. In my judgment, and in the judgment of a majority of the court, they do not amount to an estoppel. Although that is the settled doctrine of the Supreme Court of the United States, it has not been sanctioned here so as to make it a rule of decision in this State. These bonds were issued after the opinion of this court in Flagg v. City of Palmyra, and before the Franklin county cases.

In delivering opinions, the judge who delivers them is allowed to make his own arguments and illustrations, without compromitting the other judges. It is unnecessary to say that the illustrations indulged in by the learned judge, who delivered the opinion under review, were his own, and it was not necessary for the other judges to sanction them in order to concur in the result.

The only new point in this motion, not passed upon by the court, is, that the charter of the company had ceased before the company was organized. Whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in a collateral proceeding. It did exist as a matter of fact, and was in the exercise of all its chartered franchises, when the subscription was made and these bonds issued. The only proper way to test this matter is by a direct proceeding by the sovereign power of the State. It is a question between the state and the company, and a proceeding by way of *quo warranto* is the proper remedy. State Bank v. Merchants' Bank of Baltimore, 10 Mo., 124.

The motion for a rehearing is overruled. Judge NAPTON filing a separate opinion.

The other judges concur.

NAPTON, J., said: In the opinion overruling the motion for a rehearing, I concur.

In the opinion of the court, heretofore filed, I discussed no question which was not raised by the record. The points were two: First, whether the laws passed since 1857, the date of the charter in question, repealed the privilege granted in that charter of taking subscriptions from counties without a vote, and upon that point the court was agreed that they did not, on the authority of various decisions referred to.

The next point was, whether, if the bonds were conceded to have been issued under the law of 1855, which, on their face, they purported to have been, the absence of an election defeated a recovery on them; and, upon this point, I referred to the decisions of the Supreme Court of the United States, and to the decisions of this court anterior to, and long after, the issue of the bonds in controversy, and showed that both courts held such bonds valid, in despite of the want of an election, and as such was recognized to be the law, both in this state, and by the Supreme Court of the United States, *at the time of the issuance and purchase* by the holders, the bonds could not be defeated by such a plea; although this court might have held differently since, and might entertain a different opinion now.

Upon both these points, I adhere to the opinion heretofore given.

There was, of course, no opinion given, in regard to bonds issued under charters, general or special, granted since the new constitution; for no such question arose; nor could any such question arise in regard to special charters, as the new constitution prohibited any such charters.

NOTE.—The leading cases in the Supreme Court of Missouri, on the subject of municipal railway aid bonds, are Flagg v. Palmyra (city of) 33 Mo., 440, 1863; Steines v. Franklin county, 48 Mo., 167, 1871; Carpenter v. Town of Lathrop, 51 Mo., 483, 1873, and Smith v. Hall v. Clark county, above given, decided November 3, 1873. The case of Flagg v. Palmyra, was decided after the Commissioners of Knox County v. Aspinwall, 21 How., 539, 1858; Bissell v. Jeffersonville, 24 How., 287, 1860, and Moran v. Miami County, 2 Black, 722, 1862; and when it is read in connection with these cases, it will be seen that the observation of Mr. Justice NAPTON in the principal case, is quite correct, that it "substantially enunciates the doctrine of the Supreme Court of the United States." The bonds in the case of Flagg were issued under a special act of the legislature, authorizing their issue, by the city of Palmyra, in case a majority of the qualified voters should, at an election to be called by the City Council for that purpose, so determine. It appears that an election was held, and that the bonds issued by the city of Palmyra, were in the hands of *bona fide* holders

for value. It was contended that the bonds were void, because proper notice of the election was not given, and because the bonds showed on their face that they were dated prior to the passage of the ordinance of the city, under which the bonds purported (according to their recitals) to have been issued, etc. These defences were held to be unavailing, and, in giving the judgment of the Court, BATES, J., uses the language quoted in the principal case.

In 1871, Steines v. Franklin county, *supra*, was decided, and it was there held where the county court issued bonds without *any vote whatever* of the people, when the statuted require a precedent vote, that such bonds were void even in the hands of a *bona fide* holder for value, though it was competent for the legislature to validate them. Mr. Justice WAGNER comments on the leading cases in the Supreme Court of the United States, and calls attention to the contray views asserted by some of the state courts. In the course of his opinion, he remarks: "But the Supreme Court of the United States, in a series of adjudications, have established a different principle, and one which we believe is more in consonance with justice and reason. We have heretofore conformed our ruling on this subject, with the decisions of the National Court, not on account of its paramount authority, for on this question it has none—but, because it inculeated an unbending principle of right, and a rigorous morality. Whether any of the cases have gone sufficiently far to warrant the holding of these bonds binding and valid, is now to be enquired into."

Commenting also on the language of the opinion in Flagg v. Palmyra, quoted by NAPTON, J., in the principal case, WAGNER, J., observes: "This language is exceedingly broad, and if it is construed as applicable only to the facts in the case, it is sustained by numerous cases. But, if it is intended to assert that a court or a city council, who have power under certain circumstances, to make contracts and issue bonds, may disregard these circumstances or conditions entirely, and then issue bonds purporting to be in pursuance of authority which will be binding, and against which no defence can be made, we dissent from it."

And the conclusion is reached in the Franklin county case, that it is consonant with the decisions of the Supreme Court of the United States, and with Flagg v. Palmyra, to hold that bonds issued without *any* election, when the statute conferring the power requires an election, and the sanction of a popular vote, are, in whosoever hands they may be, utterly void. [But on this point, see the decisions of the United States Supreme Court since pronounced: Pendleton v. Amy, 13 Wall. 297; Lexington v. Butler, 14 Wall. 282, and particularly Grand Chute v. Winegar, 15 Wall. 355; Kennicott v. Supervisors of Wayne county, 16 Wall. 452; and Rogers v. St. Joseph Township, 16 Wall. 644; and on the other hand, Lewis v. Commissioners of Bourbon county, recently decided by the Supreme Court of Kansas, and which will be published in our next number.]

In Carpenter v. Town of Lathrop, *supra*, decided at the February term, 1873, 51 Mo., 483, which was a case in which the bonds were in the hands of an innocent holder, and recited that they were issued "under and pursuant to an order of the board of trustees of the town, * * and authorized by a vote of the people of the said town at a special election held for that purpose," and in which an election had been in fact held, the plaintiff was non-suited in the inferior court, and the judgment of non-suit was affirmed by the supreme court, on the ground that the *holder of the bond*, in order to recover must, by evidence *aliunde* the recitals in the bonds, "show, with reasonable certainty, that an election was held, at which the vote was taken, and that it had been taken and the result decided substantially in conformity to the law." In his opinion on this point, VORIES, J., 51 Mo., 498, says: "In a case like the present, it devolves on the plaintiff to show with reasonable certainty, that the authority to issue the bonds had been conferred by an election authorized by law, and that the vote had been preserved by poll-books or otherwise, by persons authorized to do so, and that the votes had at least been received and passed on by some persons authorized to pass upon them, and decide whether the election had been carried, or whether the voters had assented to the subscription. * * The recitals in the bonds are not sufficient evidence to bind the defendant, or to show that the power existed in the trustees [of the town] to execute the bonds. The recitals would, doubtless, be sufficient to justify an innocent purchaser in receiving the bonds, without being charged with notice of any mere irregularities in the conferring or exercise of the power necessary to their issue, and I think, that this is the only effect the recitals could have. The plaintiff would still have to show with reasonable certainty, that an election was held, at which the vote was taken, and that it had been taken, and the result decided substantially in conformity to the law."

This brief reference to the State adjudications prior to the principal case, in connection with the several opinions in that case, above given, will, it is believed, show with accuracy and sufficient fullness, the views of that tribunal on the subject of the power to issue bonds of this character, and the defences that may be made to them. This is the only purpose of the present note. We shall soon publish other decisions upon the same subject, rendered in the Federal Courts for Missouri, and by the Supreme Court of Kansas and elsewhere.

"Fleeing From Justice"—Construction of the Act of 1790.

THE UNITED STATES v. THOMAS M. O'BRIAN.

United States Circuit Court, District of Kansas, November Term, 1873.

Before DILLON, Circuit Judge.

Crminal Law—Limitation of Prosecution—Fleeing from Justice.—A "fleeing from justice" within the meaning of the Act of Congress limiting Criminal Prosecutions, is to leave one's home, residence or known place of abode, within the District, or to conceal oneself therein, with intent, in either case, to avoid detection or punishment for some public offence against the *United States*.

The defendant was indicted under the act of February 5th, 1867, Sec. 1, (14 Stats. at Large, 383), for selling to Hines & Eaves, bankers in Leavenworth, a check drawn by the Paymaster of the Army of the United States, upon the Assistant United States Treasurer at New York, with a forged indorsement of the name of the payee thereon, with the intent by the said Act prohibited. Under the plea of not guilty, the main question in the case was whether the offense was barred by the Statute of Limitations (1 Stats. at Large, 117, Sec. 32; 1 Bright. Dig. 322, Sec. 107). To take the case out of the Statute, the Government relied upon the proviso that the act shall not "extend to persons *fleeing from justice*."

In relation to this defence, the jury were charged orally as given below.

C. I. Scofield District Attorney, and *Thomas Ryan*, for the United States; *Thos. P. Fenlon* and *J. W. English*, for the defendant.

DILLON, Circuit Judge: The offence is charged to have been committed on the 31st day of December, 1867, and the indictment was not found until the 6th day of May, 1873—more than five years afterwards. The indictment alleges also that the defendant is a person fleeing from justice in this district, and that he has been thus fleeing since the first day of December, 1869.

The limitation statutes of Congress require an indictment for an offence, such as that here charged, to be found within *two* years from the time the offence was committed; but the statute contains a *proviso*, that the bar or the limitation shall not "extend to any person or persons *fleeing from justice*."

It becomes necessary to construe this proviso, and to instruct you as to its meaning. It is in evidence that the defendant left the district of Kansas in August 1869, and that he was afterwards publicly employed in the Paymaster's Department of the army in New Orleans, and that he afterwards resided for a time in Little Rock, St. Louis, and in Colorado, where he was arrested after this indictment was found. Before August, 1869, he had resided for some years in Leavenworth, doing business as claim agent and was well known there, and evidence has been introduced by the defendant to show that after he left Leavenworth, he was seen by different citizens of that place, in the cities above named, and that his whereabouts was generally known in Leavenworth and among all his acquaintances.

There is also evidence that there was a criminal proceeding pending against him when he left Kansas, in the *State* Court at Leavenworth for a violation of the laws of the State. There is no evidence that the defendant voluntarily returned to the district of Kansas, or had been therein since his departure in 1869.

It becomes necessary for you to determine upon the evidence, the motives of the defendant in leaving the State in the summer of 1869—or more specifically to determine whether he at that time fled from justice.

What is "fleeing from justice," within the meaning of the statute? Having reference to the facts of this case, my answer is, it means to leave one's home or residence or known place of abode,

with intent to avoid detection or punishment for some public offence against the United States.

It results from, or is implied in this definition, that if the defendant left his home in Leavenworth solely to avoid the criminal justice of the *State* of Kansas, and not to avoid the criminal justice of the United States — this will not deprive him of the two years limitation.

The criminal codes of the General Government and of the States are entirely distinct, as was held by this court in Hawthorne's case, (1 Dillon, C. C. R., 422); and in my opinion it can not be supposed that Congress intended to make any provision in respect to persons fleeing from the justice of the States.

It is implied also in the definition above given, that mere departure by the defendant from the limits of the District of Kansas, irrespective of the motives and purposes of such departure, is not a fleeing from justice. An offender may flee from justice, within the meaning of the statute under consideration, though he never left the limits of the District; as for example, by secretly concealing himself, or by not being usually and publicly known as being within it. If the defendant, after his departure from Kansas, publicly resided in various places in the United States, did not conceal his whereabouts, and kept up an open correspondence with his friends in Kansas, these facts may properly be taken into view by the jury in connection with the other circumstances in evidence, in forming their opinion of his intent and purpose in leaving the State in August 1869.

[The jury found for the defendant, on the ground that the prosecution for the offence was barred.]

NOTE.—The decisions upon the proviso of the Act of April 30, 1790, as to "fleeing from justice," are not numerous.

It was decided by Chief Justice ELLSWORTH in William's case, that it need not be a fleeing from prosecution already begun — so stated by Mr. District Judge EDWARDS in the United States v. Smith, which was a case in the Circuit Court for the District of Connecticut, reported 4 Day, 121, 1809, and where the same view was taken. Nor need it be a fleeing from process issued. United States v. White, 5 Cranch, C. C. R., 38, 1836; S. C. Ib. 116, 368, 457.

Whether mere departure from the United States is a fleeing from justice, or whether if the defendant *fled* the district, but within two years openly returned to it, he can avail himself of the Statute — see the cases above cited.

The case of O'Brian seems to be the first one which has ruled the point that the fleeing must have been from the criminal justice of the United States—and that it is not sufficient if the sole motive of the defendant in leaving his known place of abode was to avoid the criminal justice of the State. The point, however, is not free from difficulty.

Although the indictment in O'Brian's case alleged that the defendant had fled from justice, this is not necessary. The defendant may avail himself of the statute of limitation, either by special plea or under the general issue. If he pleads specially, the Government may reply that he fled from justice. And under the general issue, the prosecutor may introduce evidence to bring the defendant within the exception of the statute. United States v. Cooke, decided at the Dec. Term, 1872, of the U. S. Supreme Court, where the subject is fully examined by Mr Justice CLIFFORD; S. C., with valuable note, 12 Am. Law Reg., (N. S.) 682.

Trustee's Sale — Fraud — Payment of Debt Before Sale.

A. M. FERGUSON v. WILLAM COWARD.

Supreme Court of Tennessee, Jackson, Nov. 5th, 1873.

A. O. P. NICHOLSON, Chief Justice.
P. TURNEY,
ROBERT MCFARLAND,
JAMES W. DEADERICK,
THOS. J. FREEMAN,
JOHN L. T. SNEED,
} Judges.

1. Practice—Ejectment—Fraud.—In an action of ejectment by the purchaser at a trustee's sale, to recover the land purchased, the defendant cannot set up as a defence that there was fraud in making the sale. Such a defence is not available at law.

2. Trustee's Sale—Payment of Debt.—It is a good defence in such a suit, that the debt secured by the trust conveyance was paid by the debtor before the sale; and the exclusion of evidence tending to establish this fact, is error. By the payment of the debt by the debtor, the legal title returned to him; and the trustee had no right to sell, and no title to convey.

FREEMAN, J.—Coward brought this action of ejectment to recover a lot in the city of Memphis. A judgment was rendered for plaintiff, from which defendant prosecuted an appeal, in the nature of a writ of error.

The facts necessary to be stated are, that Ferguson conveyed the lot to Samuel H. Coward as trustee, to secure the payment of a debt due plaintiff, William Coward. The trustee sold the lot under the deed of trust, at which sale, William Coward, the beneficiary, became the purchaser; the trustee making him a regular conveyance for the same, under which he sought to recover the lot in this action.

Two questions are presented in the record for decision. First, it was proposed by defendant on the trial, to show that there were fraud and collusion between the trustee and the purchasing beneficiary, in making the sale, and thus obtaining the conveyance of the legal title. On this question, we approve the ruling of the circuit judge, that this could not be set up in a court of law, in the mode attempted, to defeat the operation of the deed.

The other question presented in the record—but not argued before us, there being no counsel for appellant in this court,—is founded on a proposition of defendant's counsel, to prove by a witness, A. M. Ferguson, the maker of the deed, that the debt secured by the deed of trust, had been paid before the sale by the trustee. Plaintiff objected to the introduction of this testimony, and the objection was sustained by the court.

In this the court erred; as we deem it now settled in Tennessee, that on payment of the debt by the mortgagor, the title returns to the former owner; not so, however, in case of payment by a third party, who, in such case would be held the assignee of the mortgage. Carter v. Taylor, 3 Head, 33. If the debt had been paid by Ferguson, before the sale, as was proposed to be shown, then the trustee had no right to sell, or title to convey. We are therefore compelled to reverse this case for the error referred to, and remand for a new trial. REVERSED.

Notes of Recent Decisions.

[We expect soon to have arrangements perfected, by which we shall be regularly furnished with notes of the latest decisions of several of the courts of last resort in the western and southern states, and also of several of the federal courts. Until then we shall be obliged to draw, to quite an extent, from our exchanges for our "notes of recent decisions." Such of the following "notes" of cases as were decided in Pennsylvania, are to be credited to the *Pittsburg Legal Gazette*. The files of our St. Louis contemporary, the *Journal of Law*, have assisted us in making notes of several Missouri cases, there published in full.]

Slander; Damages.—In an action of slander, it is not necessary that there should be an assessment of damages upon each count of the petition. Polston v. See, Sup. Court Mo., Oct. Term, 1873.

———; *Condition in life of the parties.*—The condition in life, both of the plaintiff and defendant, are proper subjects of enquiry in slander cases on the question of damages. Ibid.

———; *Quantum of Proof to Establish Justification.*—In an action for slander, when the truth of the words spoken is alleged as a justification, the defendant must make out such plea *beyond a reasonable doubt*. Ibid. SHERWOOD, J., dissenting.

Chancery Practice; Multifariousness.—A bill praying for a specific performance of a contract to convey land, and also that the defendant account for the rents and profits accruing while he was wrongfully in possession, is not multifarious. Duvall v. Tinsley, Sup. Court Mo., Oct. Term, 1873. Nov. 3.

Tax Title; Adverse Possession.—In Chapman v. Templeton, the plaintiff brought ejectment and exhibited a clear paper title. The defendant claimed under a tax deed, made in 1868, reciting a certificate of purchase

made in 1858. This was offered as *color of title* to support the defence of the statute of limitations. The only evidence of possession was, that the defendants had permitted the city of Louisiana to build a hog-pen on the center of the block in controversy, which had been occupied about two years, and had then been abandoned and gone to decay, and that the defendants had paid taxes for ten consecutive years. *Held*—

1. That there was no evidence of a continuous adverse possession ten years, so that the bar of the statute of limitations would attach. The continuous payment of taxes is not of itself sufficient to show adverse possession.

2. There being no evidence of a continuous adverse possession during the time prescribed by the statute of limitations, it was not error to refuse to permit the tax deed to be read in evidence. Supreme Court, Mo., Oct. Term, 1873.

Outstanding Title.—Another point made in last case, related to the rejection of evidence that the former owner had conveyed the land in controversy by parol, for the purpose, it would seem, of showing an outstanding title in a third party. The rejection of this evidence was held proper. Since the introduction of the common law, lands cannot be conveyed in this state by parol.

Railway Negligence; Killing Stock.—Where it was proved that the plaintiff's cow was killed by being run over by a train on defendant's railway track, at a point where it passed through the open prairie, and where there was no fence nor crossing;—*held*, that in such cases, the law presumes negligence, and it does not devolve on the plaintiff to prove it. All that the plaintiff was required to show was, that the cow strayed upon the track, without his fault, or by reason of the track not being fenced. Lantz v. St. L., Kan. City and Northern Railway Co., Sup. Court Mo. Oct. Term, 1873.

Consideration; Compounding Debt Due by Insolvent.—Where the plaintiffs and other creditors of the defendant, who was in insolvent circumstances, without any fraud, agreed to accept fifty cents on the dollar in full satisfaction of their respective claims, and the plaintiffs had been paid such composition in full, and had surrendered to the defendant the note held by them upon him in pursuance of such agreement—*held*, that they cannot maintain an action to recover the unpaid balance of such debt. Murry et al. v. Snow, Sup. Court Iowa, Dec. Term, 1873; 7 Western Jurist, 685.

Tender; Admission.—An answer averring a tender of a sum to the plaintiff, and that it is brought into court, is a good plea of tender, and operates as an admission that the sum tendered is due the plaintiff, and authorizes a verdict for the plaintiff in an amount which the jury may find due him, which cannot be less than the sum tendered. Babcock v. Harris, Sup. Court Iowa, Sept. Term, 1873, 7 Western Jurist, 687.

Rape; Evidence of Immediate Outcry.—In Burt v. The State, 23 Ohio State, 394, which was an indictment for rape, the state was permitted to prove that the prosecutrix made declarations soon after the alleged assault, *charging the defendant with being the guilty party*. The part of the testimony indicated by the italics was objected to, and it was urged by defendant's counsel that, although it was competent to admit her declarations immediately after the offence, to show the fact that an offence had been committed upon her, yet that it was incompetent to admit her declaration that *a particular person* had committed it. But the supreme court held that there was no error in admitting the testimony. WELCH, J., said: "Undoubtedly the safer and better rule, in the generality of cases is, to limit the prosecution to a general statement of the fact that complaint was made, or the substance of her declarations, and leave the prisoner to bring out the details, if he chooses to do so. How far the prosecution shall be permitted to go into details, in giving the declarations of the female, must, to a great extent, at least, be left to the discretion of the court. Whether the court might, in any given case, so far abuse that discretion, as to render the proceedings erroneous, we need not now decide. It is enough for this case, to say that we are by no means prepared to lay down as law, the rule insisted upon by counsel, namely, that in proving her declarations, the fact that the prosecutrix charged the crime upon the prisoner, should be suppressed. If she was acquainted with the party, and recognized him at the time, his name would be almost the first word she would utter, in making her outcry or complaint; and the complaint would be constrained without it. It is because it is *natural* for a female to make immediate complaint, when so violated, that the law calls upon her to show the fact of such complaint, and the law will not require her to make a complaint that is *unnatural* and constrained. We think the court did not err in admitting the testimony."

Quo Warranto; Pleading.—The enquiry in proceedings by information in the nature of quo warranto is limited to the charges in the information; and matter set up by way of plea is only material in so far as it shows warrant in law for the exercise of the authority alleged in the information to be usurped. State ex rel., etc. v. Cincinnati, 23 Ohio State, 445.

An information which charges a corporation with usurping certain franchises by acting through other parties, calls in question only the authority of the usurping corporation, and cannot be extended so as to include authority not derivable from the corporation, and which such parties exercise in their own right. Ibid.

Partnership; Dissolution; Preference of Creditors in Distribution of Assets.—The preference which creditors of a partnership may have over those of an individual partner, in the distribution of the assets of the firm, cannot be defeated by a mere executory agreement between the partners, for the sale, or transfer, of the assets of the firm to one of them, unaccompanied by any actual delivery or transfer. A delivery, or transfer, in such cases, will not be presumed, but must be shown, in order to defeat this right of the creditors of the firm; and, therefore, where such purchasing partner dies before the time fixed for the delivery or transfer of the property, assets of the firm subsequently found in the hands of the surviving partner, who is also executor of the deceased, will be presumed to be held by him in his character of surviving partner, and not as executor.

Thus, two partners, A. and G., agreed that the firm should be dissolved at a specified future time, and that A. should then take and own all its property and effects, and should pay all its debts. Before the time named, A. died insolvent, having by his will, appointed G. and another person his executors. Money belonging to the firm was placed by G. in bank in the name of the firm, subject to be checked out in that name, and was so checked out by G. in payment of debts of the firm with the knowledge and consent of his co-executors. *Held*, that so far as regards the rights of creditors so paid, the money is to be considered as assets of the firm, notwithstanding any private agreement or understanding between the executors that it belonged to the estate. Kreis v. Gorton, 23 Ohio State, 468.

Gift from Husband to Wife of Mortgaged Property; Subsequent Insolvency of Husband; Payment of Mortgage Debt Fraudulent as Against his Creditors.—Where a husband purchased lands subject to a mortgage and paid the purchase money less the amount of the mortgage debt, and for the purpose and with the intention of making a gift to his wife, procured the deed of conveyance to be made by the vendor to her, subject to the outstanding mortgage, and at the same time promised the vendor to pay the mortgage debt upon maturity: *Held*, that upon delivery of the deed to the wife she became seized of the equity of redemption only as a gift executed; that the promise of the husband to pay the mortgage debt for her benefit, did not inure to her as a gift, either of an interest in the land or of the money promised to be paid until payment in fact was made; and that, in case the husband became insolvent before payment of the mortgage, the payment thus made was fraudulent as against then existing creditors, although they became such after the delivery of the deed to his wife, and after the promise to pay the mortgage debt was made. Oliver v. Moore, 23 Ohio State, 473.

Book Notice.

A Digest of the Laws of Texas, Containing the Laws in Force and the Repealed Laws on which Rights Rest. By George W. Paschal of Austin, Texas. Vol. I., Containing the Laws from the Foundation of the Republic of Texas; until 1864 Vol. II, from 1864 to 1872. Third Edition. Washington: W. H. & O. H. Morrison, 1873.

We have had frequent occasion to consult the first volume of Paschal's Digest of Laws, and speak with some degree of knowledge as to its merits. We are aware that Judge Paschal takes pains, in the preface to these books, to set forth their good points, of which he shows plainly that he entertains a favorable opinion; and this fact has led some reviewers to dismiss him with little better than a sneer. We do not share in this feeling.

We think that Judge Paschal has, in these books, done a work of which he may be justly proud. We think it no exaggeration to say that his first volume stands unrivalled among the American codes. It possesses more elements of usefulness than any book of the kind we have ever had occasion to use.

Nothing is more perplexing to the practitioner, than a body of statute law built upon the basis of a highly refined and cultivated analysis, like that of Blackstone's Commentaries. Add to this the entire absence of cross-references, and the poor indexes which characterize many of the codes, and the difficulties of using them become almost insurmountable. Judge Paschal has wisely arranged his titles alphabetically, and has kept up a thorough system of polyglot references between kindred subjects, so as almost to dispense with the necessity of an index.

Immediately under the laws in force, are printed the repealed statutes on the same subject, on which rights may be supposed to be still pending. The old law and the new thus stand side by side, the old frequently furnishing a key to the interpretation of the new. The work also contains a system of exhaustive notes, embracing not only the decisions expounding both the old law and the new, but also, in many cases, extracts from public documents and other historical and political data—making a running commentary upon the text, acquainting the reader with the history and policy of the laws before him, and the exposition they have received in the supreme court of Texas, and in the courts of the United States.

We have but one complaint to make. The notes in the first volume are run together without much apparent system; and, with the evident view of saving space, are packed, so to speak, in very fine type, without paragraphs, and without catch-words to indicate the various subdivisions of the subjects treated of.

In the second volume the notes are thrown into paragraphs, but we miss the catch-words; which, though they might diminish the artistic appearance of the pages, would nevertheless add to the usefulness of the book.

The publishers have done their share of the work well. The second volume, in particular, is a model of typographical excellence.

Notes and Queries.

EDITORS CENTRAL LAW JOURNAL—You would greatly oblige me, if you would give me your opinion (or refer me to authority) upon the following: Has a non-resident, owning property within the corporate limits of a town, the right to go into the federal court to *test the validity of a tax*, which the state courts, having jurisdiction, have decided said corporation has *a right to levy*.

ANSWER—If the tax upon the non-resident exceeded $500, we think he could file a bill in the federal circuit court, if he could bring his case within some recognized head of equity jurisdiction; but if the supreme court of the state had already decided the tax to be valid, and if this decision involved simply a construction of the local laws of the state, the federal court would follow the decisions of the state court.

Thanks.

We return thanks to the following publishers and reporters for sending us exchanges and advance sheets of reports in advance of our first issue:

To Messrs. King & Baird, 608 and 609, Sansom street, Philadelphia, for the *Legal Gazette*.

To J. W. & J. S. Murray, 73 Grant street, Pittsburgh, for the *Pittsburgh Legal Gazette*.

To J. M. Power Wallace, Esq., 132 South Sixth street, Philadelphia, for the *Legal Intelligencer*.

To Messrs. Mills & Co., Des Moines, Iowa, for the *Western Jurist*.

To John M. Shirley, Esq., of Andover, N. H., Reporter for that state, for advance sheets of Vol. 52 of the New Hampshire Reports.

To Messrs. Robert Clarke & Co., of Cincinnati, for advance sheets of Vol. 23 of the Ohio State Reports.

Legal News and Notes.

—THE Supreme Court of the United States adjourned on the 24th of December until the 5th of January.

—THE supreme court of Missouri meets at Jefferson City on the 5th of January.

—THE supreme court of Minnesota is not in session. Judge McMillan is in Florida recruiting his health, and Judge Ripley has been stricken with paralysis. All opinions of any value determined up to this time will appear in the 19th Minnesota, which is nearly ready for issuance. It is not probable that any more opinions will be filed before April next.

—THE circuit court at Murphysboro, Ill., has just decided against the validity of certain bonds issued in compliance with an agreement entered into between the city of Carbondale and the Southern Illinois Normal University commissioners, to secure the location of that institution in Carbondale. The case will probably be taken to the supreme court.

—THE president has nominated for United States attorney for the eastern district of Virginia, Mr. James Lyons.

—THE new constitution of Pennsylvania has been adopted by over 150,000 majority.

—THE new constitution to be submitted to the people of Michigan, provides for an appointed judiciary.

—THE Kentucky legislature has passed a bill providing for a constitutional convention. The *Courier Journal* says: "The friends of constitutional reform achieved a victory in the Kentucky legislature Wednesday, which is of the first significance. The initiatory step for the calling of a convention to revise our organic law was adopted in the senate by a vote of twenty-three to eleven, and in the house by a vote of fifty-eight to thirty-nine—a majority of democrats voting for the measure. It will be seen that in the house seven votes more than necessary were cast for the bill, and of those present, there was a majority of eighteen. This result gives promise of a new and bright career for Kentucky. Those who argued and labored for the measure deserve the highest praise."

—MR. GAGE, the defaulting treasurer of Chicago, accounted for the interest in the public money in his hands, which his predecessors pocketed. In this way he saved for the city, during his term of office, about $130,000. His sureties now propose, in case they are sued for the amount of his defalcation, to endeavor to have the interest so accounted for, deducted as an offset from the amount of their liability. And it is said that legal opinion is divided as to whether this can be done.

—As instances of the extent to which the spirit of reform will go when it gets started, and of the rapid progress which it sometimes makes, particularly when dealing with subjects with which the reformer is not fully conversant, we may note the following:

In the Indiana State Farmer's Grange, which met the other day at Valparaiso, a resolution was introduced, and (we believe) passed, urging that the trial of all offences punishable by fine and imprisonment in the county jail, be committed to justices of the peace.

In the Illinois farmer's convention, which recently met at Springfield, the following resolutions were offered:

"WHEREAS, Our courts, as operated at present, are one of the most grevious burdens borne by the people, and are governed in their action to a great degree, by antiquated precedents of the dead past, in cases having often but little resemblance to the issues of the living present, and are a stigma on the boasted intelligence and progress of the American people, costing a vast amount of money to all tax-payers, simply, in many cases, to gratify a morbid taste for practicing the tricks, and for the beautiful uncertainties of the law; therefore,

"*Resolved*, As the sense of this convention, that the people should imperatively demand immediate legislation for the reconstruction of our courts on principles of common sense, prominent among which shall be a provision setting apart a portion of the time of each session, for the hearing of cases presented by parties in person making joint issue, the decision of the court to be final."

"*Resolved*, That the doctrine of vested rights, by which railroad corporations claim exemption from legislative control, belongs to a past age, and, as it cannot exist without infringing on the rights of citizens generally, it has no legitimate place in the jurisprudence of a free people."

We have not learned what was done with the last two resolutions. It would be well for those who, without being familiar with the present laws or with legal or constitutional history, propose the most radical and fundamental changes in the law, to remember the suggestion of Herbert Spencer, that the substitution of new laws for old ones, not only does not, in many cases, remedy existing evils, but sometimes brings a train of new evils, entirely unexpected and unprovided for.